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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM HORTON,

Petitioner,

vs.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals, in reversing a jury verdict for Petitioner and ordering judgment n.o.v. for Respondent, violate the clear mandates of the Seventh Amendment, the *Erie* Doctrine and the innumerable cases of this Court enunciating clear prohibition of *de novo* factual review.

a. Does not the appellate opinion below represent yet another in a series of cases, based upon review of recently published appellate opinions, that are subjecting jury factual findings to *de novo* review and thus necessitating this Court's exercising its paramount supervisory authority so as to reaffirm the permissible bounds of appellate examination of jury findings, thereby promoting the impartial administration of justice?

b. Do not the particular circumstances of this case disclose not only patent reweighing of facts and reassessment of witness credibility on the single ultimate factual question at issue but, additionally, a clear manifestation of intent to impose additional elements of proof not previously enunciated by any Illinois Court, all in clear violation of the *Erie* Doctrine, thereby requiring this Court to exercise its supervisory power to promote conformity of federal courts in Illinois with that state's law and insuring all Illinois' citizens their right to remedy?

c. Do not the particular circumstances of this case present this Court with the opportunity to clearly enunciate the application of a single federal standard to govern judicial determination of motions for directed verdict or judgment n.o.v., thereby promoting uniformity of procedure in the federal system?

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In The

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WILLIAM HORTON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The decision of the court of appeals is reported at 776 F.2d 1351 (7th Cir. 1985), and is set out in the Appendix at A1-A18. The order denying rehearing is set out at A19. There was no district court opinion and judgment of the district court is in the Appendix at A35.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1985. A timely petition for rehearing was filed, which was denied on November 27, 1985 (A19). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The U.S. Constitution, Seventh Amendment, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.

28 U.S.C. § 2072, provides with regard to the Fed. R. Civ. P.:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Fed. R. Civ. P., Rule 38 provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

Petitioner, William Horton, commenced this action in February, 1983, in the Circuit Court for the Tenth Judicial Circuit, Peoria County, Illinois. The action was on a claim of retaliatory discharge against his former employer, Miller Chemical Company.

The Defendant removed the action to the District Court for the Central District of Illinois under 28 U.S.C. §§ 1332, 1441(b) and 1446.

On June 25, 1984, the trial was commenced and the jury returned its verdicts on June 26, 1984. The jury returned a verdict in favor of the Plaintiff and against the Defendant and awarded Plaintiff compensatory damages in the amount of $73,825 and $100,000 in punitive damages. Judgment was entered on June 26, 1984, for Plaintiff in those amounts.

On October 22, 1984, the District Court denied Defendant's post-trial motions for judgment notwithstanding the verdict or to alter and amend the judgment and, alternatively, seeking a new trial (A36).

The vast majority of the facts giving rise to the Petitioner's claim were undisputed.

Petitioner asserted a retaliatory discharge because his employer, after being put on notice that the Petitioner had injured his back and should refrain from lifting for a seven (7) day period of time, discharged him within twenty-four hours of receipt of that information. Plaintiff was discharged after he had initiated treatment with a chiropractor and had presented the authorization for absence, from the chiropractor, to his employer. At the

time of discharge, Petitioner was told by his employer that he was a bad risk.

Petitioner was hired on January 16, 1978, as a truck driver/delivery man; Petitioner advised the local manager for Respondent that he had had some intermittent back pain since 1955. Petitioner has never suffered more than chronic back pain.

Petitioner completed the tenth grade of high school education and thereafter worked in various labor jobs. He did factory work and drove a truck until 1946, then went into the United States Army. Upon return from the army, he went to work for Caterpillar Tractor Company, and thereafter, farming. After farming, he began work as a welder and did that until he left the Peoria area to live in Wisconsin. He remained in Wisconsin for a few years and then returned to the Peoria area in 1977. It was at that juncture that Petitioner was asked to come to work for the Respondent as a driver/delivery man. At the time of his initial interview with Respondent, the Petitioner advised his prospective employer (the Respondent herein) that he would attempt to do the work, although he might experience some back problem.

Initially, Petitioner experienced some back difficulties which resulted in quitting his job. He began work on January 16, 1978, and quit on February 10, 1978. He did, however, return to work on February 10, 1978, though subsequently quitting and returning again during the latter portion of the month of February of 1978. He testified that he was having some complaints with his back and that the equipment he was using was causing him some difficulty.

Petitioner was rehired several times thereafter, and was finally reinstated in August of 1978. Between August of

1978 and April of 1981, Petitioner was only off work twice. One of those occasions, the latter, was by reason of an accident arising out of and in the course of his employment where he was "temporarily totally disabled" from March 28, 1980 to June 1, 1980. His temporary disability resulted in a workers' compensation settlement. He was not represented by counsel at that time.

Petitioner further testified that in 1980, he had considered and applied for employment at the Westinghouse Airbrake Company (WABCO) in Pecria, Illinois. He did not take the job at the request of Mr. Lawrence Hoffman, Respondent's managing officer.

On Friday, April 24, 1981, Petitioner suffered a low back strain by reason of an accident arising out of his employment. Upon return to the Peoria office, Petitioner reported the incident to Richard Dunham, office manager for Respondent. Petitioner advised Mr. Dunham at that time that he had injured his back and he was going to see his doctor. Mr. Dunham told him to go ahead. On the following Monday morning, Petitioner went to see a chiropractor, Dr. Grogg, who examined him and gave him an adjustment to his back. The chiropractor also gave Plaintiff a slip to take to his employer which was entitled "Authorization for Absence" and this slip stated "This is to certify that Bill Horton is under my care. In order to avoid aggravation of his/her condition, I recommend that he/she be excused from 4/27/81 until 5/4/81." There were also remarks concerning right L5 disc protrusion—no lifting and signed by the doctor.

On April 27, 1981, Mr. Dunham contacted Mr. Hoffman, Respondent's chief executive officer in Omaha, and advised him of the authorization for absence slip. Mr. Hoffman stated that prior to that point in time, he had not

personally viewed Mr. Horton's personnel file, nor was he aware of the history of Mr. Horton's back problems dating back to the date of his employment. Mr. Hoffman did state that Mr. Dunham made him aware of Petitioner's history at the time of the telephone conference on April 27, 1981.

Mr. Dunham testified, however, that prior to April 27 or 28, 1981, he had no knowledge of the personnel records of Mr. Horton and had not viewed the personnel file. Mr. Dunham further testified that he read the authorization for absence slip to Mr. Hoffman while they were on the phone together. Mr. Dunham further testified that Mr. Hoffman asked him how long the restriction was to last and Mr. Dunham had indicated that at the time of that telephone conference with Mr. Hoffman, he did not know how long the work restriction would last. He also testified that the word "permanently" was not on the restriction given to him by Mr. Horton.

Mr. Horton testified that on April 28, 1981, he returned to the Miller Chemical Co., offices and was thereupon advised by Mr. Dunham that he had talked with Mr. Larry Hoffman in Omaha. Mr. Dunham stated to the Petitioner that he was sorry, but "we will have to terminate you. You're a bad risk. We can't keep you on this employment."

The Petitioner subsequently pursued a workers' compensation claim under the Illinois statutory scheme and, after litigation, the matter was settled by a lump sum settlement contract. The lump sum settlement contract, in evidence, established that Petitioner was temporarily disabled from April 24, 1981 to June 26, 1981, a period of nine weeks.

Trial was commenced on June 25, 1984, and concluded with the jury returning a verdict on June 26, 1984, and awarding Plaintiff compensatory damages of $73,824, and $100,000 in punitive damages.

The district court was presented with a lengthy post-trial motion which included therein a motion for judgment n.o.v. All post-trial motions were denied by the district court.

Upon appeal, the Seventh Circuit reversed outright Petitioner's unanimous jury verdict on the ground that "Plaintiff had failed to set forth sufficient facts from which a jury could reasonably infer, given all the evidence presented at trial, the Defendant's motive in discharging him was to deter him from exercising, or to interfere with the exercise of, his rights under the (Workers' Compensation) Act. Thus, the Defendant was entitled to a judgment n.o.v."

The Seventh Circuit acknowledged that the Plaintiff had presented some evidence that the Defendant discharged him because he thought the Plaintiff was a bad risk for exercising his rights under the Act, but went on to indicate that, in their opinion, the evidence only showed that perhaps the Plaintiff had been unjustly treated because the Defendant had "erroneously decided that the Plaintiff was permanently disabled". The jury, however, had been instructed specifically that if they had found that the Plaintiff was discharged because of his physical inability to perform the duties of his employment, rather than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act, they should then find for the Defendant.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE, A PECULIARLY STATE COMMON LAW TORT ACTION PRESENTING A JURY VERDICT FOR PLAINTIFF THAT WAS REVERSED BY THE COURT OF APPEALS DECISION ORDERING A JUDGMENT N.O.V. FOR DEFENDANT, IS REPRESENTATIVE OF A CONTINUING PATTERN OF FEDERAL APPELLATE DECISIONS WHICH ARE ROUTINELY REVERSING JURY VERDICTS ON THE BASIS OF REWEIGHING OF EVIDENCE AND REASSESSMENT OF THE CREDIBILITY OF WITNESSES; SUCH ACTION IS IN DIRECT CONTRADICTION OF THE MANDATES EXPRESSED IN THE SEVENTH AMENDMENT TO THE CONSTITUTION, THE "*ERIE*" DOCTRINE AND THE RICH HISTORICAL PRECEDENT GOVERNING REVIEW OF DISPUTED FACTUAL ISSUES WHICH JURIES ARE ASKED TO ADDRESS.

This Court's rich history as the special guardian of constitutional rights of the members of society is replete with the principle that factual issues are the particular province of a jury's determination and should not be subject to *de novo* appellate review which proceeds from reweighing of facts and reassessing witness credibility.

An insidious process of which neither this Court, nor in large part, the members of society are aware is presently under way which violates that very standard—in clear contradiction to the Seventh Amendment, the "*Erie*" Doctrine,[1] § 2072 of the Judicial Code, and the Fed. R. Civ. P. Rule 38(a).

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[1] *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, and all of its progeny.

If the data referenced to herein[2] permits the conclusion that there is a recognizable percentage of cases where the factual issues are being given *de novo* review with the concomitant result of verdict reversal, this Court must express to all of the federal circuits that the determination of factual issues at the trial court level are to be given the greatest of weight at the review stage and that a reweighing of evidence and reassessment of witness credibility, to permit the finding of a result different from that which the jury reached, is a particularly inappropriate intellectual process which directly contravenes both the express wording of, and meaning for, the standard enunciated in the Seventh Amendment to the United States Constitution.

Petitioner acknowledges that there may be perceived herein a case involving only a factual dispute—an isolated example which would not fit into the "type" of case with which this Court should have to concern itself. Such perceptions are inappropriate in light of all of the circumstances surrounding this case.

It is beyond peradventure true that there exists an overriding federal principle which mandates the high judicial respect which must be accorded to a jury's determination of disputed facts. The Seventh Amendment unequivocally expresses this mandate in terms neither convoluted, nor ambiguous.

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[2] Express reference is made herein to the data accumulated in a cause presently before this Court and captioned *Christine A. Craft, Petitioner v. Metromedia, Inc., Respondent,* No. 85-1053, on Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The data was attached in an appendix, at pages A107 through A128, to that Petition. Express permission for reference to that data was granted to counsel for this Petitioner by Mr. Dennis E. Egan, Esquire. That data is expressly incorporated herein by reference.

The mandate expressed in the Amendment must be viewed in its historical perspective: The procedures at common law, as they existed at the time of our national inception, are those which are said to specifically govern the application of judicial review of factual issues tried and submitted to a jury when a court is asked to determine, as a matter of law, whether there existed enough evidence to make an issue for the jury.[3]

As this Court has so succinctly stated in the past:

> It is not the function of a Court to search a record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions which it considers the most reasonable. (Citations). That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable. (*Tenant v. Peoria and P.U. Ry. Co.*, 321 U.S. 409, 412, 321 U.S. 29, 35).

That the fact finding process through jury deliberations has historically been accorded the highest degree of solem-

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[3] Rule 50(b), Fed. R. Civ. P.; 9 Wright & Miller, *Federal Practice and Procedure*: Civil § 2522; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890 (1935).

nity is without question. Whether, in fact, that process is presently being abused is a question of the greatest importance for all people living within the broad expanses of this nation's borders.

The appellate opinion in this case presents another example of a process that is presently ongoing and can only be defined as an unconstitutional exercise of *de novo* appellate review of issues that are within the particular province of the jury in a civil trial setting.

A recent study[4] concluded that in all of the opinions issued by the federal appellate courts between October 1, 1984 and October 1, 1985, 233 cases involved challenges to the correctness of the jury's verdict. Of that figure, fully 105 appellate decisions resulted in reversal of the verdict, in whole or in part.

The study further points out that in nearly all of the 105 reversals, the district court had sustained the verdict which the appellate court reversed.[5]

Of greatest significance was the determination that the reversal rate, where verdicts were in favor of Plaintiffs and where commercial cases were excluded, was 57.9 percent: The probability of this occurring by chance was less than 1 in 10,000. In a legal system that, generally, demands proof of causation in civil cases by a standard of "more probably true than not true", the only conclusion that can be reached upon examination of the appeals as outlined in the study must be that those results occur by

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[4] See footnote 2, *supra*.

[5] The same process transpired here: more so, when it is recognized that the jury was specifically directed to find for Respondent if they believed Respondent's theory of medical inability and for any other reason other than their finding that Petitioner's discharge was a retaliatory act.

reason of some conscious intent to juxtapose *de novo* appellate re-examination of jury verdicts.

The founders of this nation, those who framed our constitutional government and fought for its birth, brought to this system a paramount distrust of the tyranny that absolute power may create. The circuit courts of appeals represent, as a practical matter, the courts of last resort for many litigants who seek judicial scrutiny of and redress for wrongs incurred within the daily give and take of life in our society.

The absolute duty imposed upon the judiciary by the Seventh Amendment, reaffirmed in § 2072 of the Judicial Code, as well as Rule 38(a) of the Fed. R. Civ. P., clearly and unequivocally expresses that very fear of which the framers of our nation's constitutional government thought most passionately about.

> The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. (*Parklane Hosiery v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 657, 658, Rehnquist, J. dissenting.)

In the case of *Anderson v. City of Bessemer City, N.C.*, ____ U.S. ____, 105 S.Ct. 1504 (1985), this Court reaffirmed and clearly enunciated the meticulous standard by which a district court's findings of fact, sitting without a jury, may be evaluated at the appellate level. The same principles apply to judicial review of any fact findings—whether by court or jury.

The jury's seemingly inviolate function as fact finder is presently being eroded. Petitioner submits that this case

presents yet another example of that process.[6] There is no doubt that:

> Where there are two permissible views of the evidence, the fact finders choice between them cannot be clearly erroneous. (*United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).)

The purpose for such absolute prohibitions to appellate pronouncements is to ensure that those who are "permanently attached to the sovereign"[7] may not—and should not—interfere with a resolution by the finder of fact even though the "sovereign" may find the result either disadvantageous or politically unacceptable. Nearly fifty years ago in a case involving the second clause of the Seventh Amendment, Justice Sutherland eloquently bespoke this Court's important duty of construing and upholding the Constitution. (See: *Dimick v. Schiedt*, 295 U.S. at 485, 55 S.Ct. at 300).

By the very nature of the national scope of this Court's attention, many cases must be declined which can only be perceived to involve factual disputes between the parties to the litigation.[8] Yet, the very exigencies which compel this Court to decline many such cases creates a danger that those who sit in a position to represent the voice of the sovereign as a court of last resort may undertake to permit their own personal objections to become superimposed upon the decision of the finder of fact. Such a practice is ongoing even now. Without a clear pronounce-

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[6] The appellate opinion in this case was issued more than one month after the date upon which the study was concluded; see footnote 2, *supra*.

[7] *Parklane Hosiery v. Shore*, 439 U.S. 322, 99 S.Ct. 645, at 663, Rehnquist, J. dissenting.

[8] *Wilkerson v. McCarthy*, 60 S.Ct. 413, 419, Frankfurter, J. concurring.

ment by this Court, the inalienable right of the individuals in our nation to be free to have a jury pronounce the ultimate factual resolution to a dispute is in grave danger of becoming a mere phrase to which lip service will be accorded without any substantive merit. This Court's unique constitutional stewardship provides the impetus for certiorari in this particular matter.

II.

THE PARTICULAR CIRCUMSTANCES OF THIS CASE—NEARLY ALL EVIDENTIARY FACTS BEING UNDISPUTED, WITH THE SINGLE ULTIMATE ISSUE OF FACT BEING DETERMINED THROUGH INFERENCE AND THE EVALUATION OF WITNESS CREDIBILITY—PRESENTS THE PRECISE ISSUE WHICH IS CONTEMPLATED SHOULD BE DETERMINED BY A JURY WITHOUT FEAR OF *DE NOVO* APPELLATE REVIEW.

The brevity of the trial record in this case permits an examination of the exact evidentiary facts which became the focus of the appellate court's opinion below. An examination of the facts clearly discloses that the Seventh Circuit Court of Appeals undertook a patent reweighing of evidence and reassessment of witness credibility to reach a determination of the ultimate factual dispute which was contrary to that enunciated by the jury. Such a process is clearly violative of the very mandates expressed by this Court. (*Mercer v. Theriot*, 377 U.S. 152, 156 (1964), *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444 (1959)). The appellate opinion hereinbelow expressly acknowledges the existence of evidence by which a jury could conclude as it did in the district court; yet then proceeds to violate not only the very pronouncements of this Court, but the standard for reviewing a motion for

judgment n.o.v. as set forth by the State of Illinois—the standard by which it believed itself to be governed.[9]

A brief recitation of the legal principles of the tort of retaliatory discharge, as that tort has been enunciated by the Illinois Supreme Court, is necessary for a complete understanding of the gross error committed by the Seventh Circuit Court of Appeals. The tort of retaliatory discharge was first enunciated in Illinois in the seminal decision of *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1979). It was therein declared:

> We are not convinced that an employer's otherwise absolute power to terminate an employee-at-will should prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmens' Compensation Act. As we have noted, the legislature enacted the Workmens' Compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening the discharge of employees seeking compensation under the Act. (74 Ill.2d at 181, 182)

Shortly thereafter, in *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981), the elements for a cause of action for retaliatory discharge were clearly defined.

> All that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy. 85 Ill.2d 124 at 134.

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[9] Cf. Pts. III, IV, *infra*. Whether the proper standard was applied, Petitioner suggests it would make no effective difference—under any standard, the Seventh Circuit engaged in a reassessment of credibility of witnesses and patent reweighing of evidence.

In all subsequent decisions, these elements of proof have been reaffirmed.[10]

In this case, the court of appeals concluded its evaluation by stating:

> It is possible that the Plaintiff may have been discharged without just cause, but in Illinois an employer is not liable in tort for discharging an at will employee because it *erroneously believes* that the employee is permanently disabled. (Emphasis added)

The adverbial qualification "erroneously believes" goes to the very heart of the issue presented to this Court. The question of whether or not the Respondent erroneously believed the Petitioner was permanently disabled or whether the Respondent discharged the Petitioner for pursuing those rights afforded to him under the Illinois statutory scheme was the very question the jury was asked to answer.

To fully appreciate the appellate court's unlawful reevaluation process, it is necessary to point out that certain critical *facts*—which were presented to the jury—are conspicuous by their absence within the confines of the appellate court's opinion. These facts are uncontradicted in the record—only the meaning of or inferences to be drawn therefrom remained at dispute. These facts are, in part:

> a. Within twenty-four hours of presenting the Respondent with a medical authorization for absence, the Petitioner was fired and told, at that time, that he was being fired because he was a bad risk;
>
> b. Respondent admitted that an employee, who was a good employee, could have become sick and

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[10] Cf. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1985); *Darnell v. Impact Industries*, 105 Ill.2d 158, 473 N.E.2d 935 (1985).

have been off of work indefinitely without fear of losing his job;

c. The Petitioner had one week's vacation time coming at the time of his discharge, yet no one, admittedly, suggested he take his vacation in lieu of discharging him.

The court of appeals noted, as supportive of its reasoning process: "In addition, Hoffman and Dunham testified *consistently with one another that they understood* the doctor's note to mean that Plaintiff could do no more lifting, that he could therefore not perform his job and that, as a result, he had to be discharged." (776 F.2d at 1358). The appeals court failed to point out that both Messrs. Hoffman and Dunham were officers and managers of Respondent's company, and Dunham was impeached at trial.

The intellectual dishonesty is more pervasive, however, when it is recognized that the "doctor's slip" was the only piece of medical evidence awardable to Respondent at the time of Petitioner's discharge. The slip itself is a very damaging piece of evidence that was presented at trial—and again, conspicuous by absence in the appellate court opinion. Despite the appellate opinions interpretation to the contrary, it was *not* ambiguous in scope at all (cf. 776 F.2d at 1356). See also A37.

The Respondent claimed, at trial, that it believed Petitioner permanently disabled and had to let him go. Yet, it is uncontradicted by their own testimony, that the word permanently was never present on the slip.

The appellate opinion recites that the district court held that the evidence of "bad risk" was very ambiguous.

The appeals court concluded that the Respondent had erroneously believed the Petitioner permanently disabled, and, within twenty-four hours, in good faith, reasoned that he could no longer medically be a viable employee.

This was the very argument proffered to the district court by the Respondent. At the time of its motion for directed verdict, the following colloquy took place between Respondent and the district court:

> THE COURT: My understanding of the Workmen's Compensation Act is that one of the things that [is] specifically addressed there is the availability of medical attention.
>
> MR. CASSIDY: What is in this record that anybody retaliated for seeking medical attention other than that he followed his doctor's orders? As a matter of fact, "retaliation" means some affirmative act on the part of the employer. This was his choice, not our choice.
>
> THE COURT: There is a slight difference between suggesting that he be off a week and suggesting that he be off permanently. Let me say this: It seems to me that as to the question of whether or not he was discharged because he sought medical care pursuant to the provision of the Workers' Compensation Act or that he was discharged because of his inability to perform the work, that's a question; although it is a close, I think [it] [sic] is a question of fact for the jury. . . . (Tr. 140-414).

The strongest piece of evidence that can be presented to this Court to clearly establish the breadth of the court of appeals' error is that the jury, at the trial stage, was asked to address the very question (and thus, make the very inference) that the Respondent advanced to both the district court in its motions and the appeals court in its appeal: This was the very argument that was *accepted* by the appellate court as the proper factual inference to be drawn from all of the evidence. At the request of Respondent's counsel, the following instruction was given to the jury:

> The Plaintiff in this case was an at will employee and the Defendant had the right to discharge him for any reason other than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act. *If you find that the Plaintiff was discharged because of physical inability to perform the duties of his employment rather than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act, then your verdict should be for the Defendant.*" (Transcript of hearing, page 24) (Emphasis added)

Even more glaring is the appellate error when it is observed that the jury was expressly required, on causation, to find that "but for Plaintiff's conduct of pursuing his rights under the 'Act', he would not have been discharged".[11]

The issue, the question to be ultimately determined by the jury, was a relatively simple one—what was the intendment of the Respondent at the time of Petitioner's discharge. Petitioner acknowledges that reasonable men may differ as to what intent may be inferred from any given set of surrounding facts and circumstances. Yet, the jury in this case was given full opportunity to hear the evidence and observe the witnesses. In its opinion, the appellate court observed:

> The Plaintiff therefore presented some, albeit minimal, evidence that the Defendant discharged him because he thought the Plaintiff was a "bad risk" for exercising his rights under the Act. (776 F.2d at 1357).

Thus, the court of appeals acknowledged such an interpretation may be found in the evidence—yet they proceeded to reweigh the evidence and reassess the credibility of certain witnesses to arrive at a conclusion that the

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[11] Transcript of hearing, page 241.

jury expressly rejected. As this Court has so eloquently stated in the past:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. (*Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, at 744 (1946))

The particulars of this case present a clear picture of an appellate court which has violated the basic precepts of appellate review of jury findings by usurping the right constitutionally given to juries to weigh the evidence. The trial court's jury instructions virtually *commanded* the jury to find for the Respondent if any reasonable inference could be made that the Petitioner was discharged for his perceived medical inability to work and not just because of the pursuit of his statutory rights.[12] The appellate court's resolution of this case is so clearly at odds with the mandates which are set forth to govern that review, this Court should issue certiorari.

---

[12] In this particular case, the jury was out less than 90 minutes. A clear statement of rejection of all of the inferences that the Respondent requested them to make, and which the appeals court accepted.

III.

THIS CASE IS REPRESENTATIVE OF A LINE OF DECISIONS BY THE FEDERAL APPEALS COURT CONSTRUING THE ILLINOIS COMMON LAW TORT OF RETALIATORY DISCHARGE IN A FASHION THAT RESULTS IN DEPRIVATION OF A LITIGANT'S RIGHT TO REMEDY FOR THAT TORT IN THE FEDERAL SYSTEM, ALL IN CLEAR VIOLATION OF THE *ERIE* DOCTRINE.

The Illinois Tort of Retaliatory Discharge was first enunciated by the Illinois Supreme Court in the case of *Kelsay v. Motorola, Inc., supra,* wherein it was stated:

> We are not convinced that an employer's otherwise absolute power to terminate an employee-at-will should prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmens' Compensation Act. As we have noted, the legislature enacted the Workmens' Compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening the discharge of employees seeking compensation under the Act. (74 Ill.2d at 181, 182)

Subsequently, in *Palmateer v. International Harvester Co., supra,* a case concerning the discharge of an employee because he had assisted local authorities in criminal prosecution of a co-employee, the elements of the cause of action were clearly and distinctly enunciated. These elements have been, consistently, reiterated without substantive change.

> . . . [I]n *Palmateer v. International Harvester Co.,* (1981) 85 Ill.2d 124, an employee was terminated for informing police of suspected criminal activities of his co-workers. In holding that the tort of retaliatory discharge was applicable, we stated:

> The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses . . .
>
> All that is required (to bring a cause of action) is that the employer discharge the employee in retaliation for the employees activities, and that the discharge be in contravention of a clearly mandated public policy. 85 Ill.2d 124, 133-134. (*Midgett v. Sackett-Chicago, Inc.*, (1984) 105 Ill.2d 143, 148)

The *Midgett* case, *supra*, takes on added significance because it represents a second time that the Seventh Circuit Court of Appeals was indirectly reversed by the Illinois Supreme Court in construing this particular Illinois common law tort.

On two occasions prior to the present case, the Seventh Circuit had ruled in this particular area. The first case, *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977), resulted in a determination by the Seventh Circuit that, if Illinois were to address the question, it would declare that no cause of action existed for the tort of retaliatory discharge. In December of 1978, the Illinois Supreme Court specifically stated: ". . . [W]e believe that the construction adopted on *Loucks* contravenes a public policy of this state." (*Kelsay v. Motorola, supra*, at 182).

The Seventh Circuit again addressed the scope of the tort of retaliatory discharge and, again, interpreted its breadth very narrowly: it held that employees under collective bargaining agreements have no right to a separate action for retaliatory discharge. (*Lamb v. Briggs Mfg.*, 700 F.2d 1092 (7th Cir. 1983)). In 1984, the Illinois Supreme Court pronounced, in direct response to, among other decisions, the *Lamb* case:

> ". . . We consider, however, that in order to provide a complete remedy, it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement. In *Kelsay*, an essential factor in providing the action for retaliatory discharge was a recognition of the importance of permitting the allowance of punitive damages against the offending employer.
>
> . . . Applying this reasoning here, there is no reason to afford a tort remedy to at-will-employees, but to limit union members to contractual remedies under their collective-bargaining agreements . . . (citation) . . . If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against the violator of an important public policy of this state . . . There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. (*Midgett v. Sackett-Chicago, Inc.* (1985) 105 Ill.2d 143, 149, 150, 151)

The case herein is, again, an expression by the Seventh Circuit of a particularly restrictive interpretation of this cause of action—for though the appeals court must admit to the existence of the action, it attempts to enunciate new elements of proof and additional burdens that are placed upon a Plaintiff who brings the action. The articulation of such substantive rules of decision clearly and patently violates *Erie Railroad v. Tompkins*, *supra*, and all of its progeny, as enunciated by this Court.

The deleterious effect of this ruling upon pending actions or those which may arise in the future is self-evident: The appellate decision in this case will be highly persuasive to all courts of Illinois, and certainly, considered as precedent for all federal district courts sitting in that forum state.

Specifically, the appellate opinion in this case states:

> These Illinois' cases demonstrate that to show retaliatory discharge, the Plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights. (776 F.2d at 1356)

The opinion then, in holding, states:

> It is possible that the Plaintiff may have been discharged without just cause, but in Illinois, an employer is not liable in tort for discharging an at-will-employee because it erroneously believes that the employee is permanently disabled. Tort liability only attaches when the Plaintiff sets forth sufficient evidence of Defendant's illegal motive. In this case, that evidence was not presented[11]" (775 F.2d at 1359).

The most telling expression by the appeals court is found within the confines of "footnote 11", as follows:

> There is some hint in recent Illinois' cases that the burden of proof scheme set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should apply in the instant case. See *Darnell*, 105 Ill.2d at 162-163, 473 N.E.2d at 938 (Simon, J. concurring) (suggesting that directed verdict may be appropriate when the plaintiff presents a prima facie case, the defendant presents a legitimate non-discriminatory reason for discharge, and the plaintiff fails to rebut the non-discriminatory reason).
>
> In this case, the defendant presented a legitimate non-discriminatory reason and it would have been entitled to summary judgment, because the plaintiff simply failed to present sufficient evidence that the proffered reason was pretextual.

It can be clearly and unequivocally stated that only by the furthest stretch of imagination does the dissent by Justice Ryan, concurring in *Darnell v. Impact Industries*, 105 Ill.2d 158 (1985), state or imply adoption of the federal discriminatory scheme:

> Our opinion does not suggest, however, much less hold, that the Defendant could have not discharged the Plaintiff for dishonesty if it demonstrated, as it contends was the case, that she had lied on her application. The verdict was directed before the Defendant offered any evidence of its reason for discharging the Plaintiff. *What the reason for the discharge was is a question of fact to be determined by the finder of fact after the Defendant has presented its case.* (*Darnell v. Impact Industries*, (1984) 105 Ill.2d 158, 163, Justice Simon, concurring) (Emphasis added).

The court of appeals is thereby attempting to superimpose elements of federal discriminatory cases onto this state common law tort. It is the clear intent of the Seventh Circuit to require a Plaintiff to carry an additional element of proof as part of its burden—an element heretofore unknown in the Illinois courts. Thus, the appeals court clearly would violate the *Erie* Doctrine.

It is clear that the focal point of a retaliatory discharge claim is the act of termination of the employee. Whether or not the employee subsequently proceeds with those rights afforded to him under the stated public policy of the State of Illinois is irrelevant to a factual determination of whether or not the individual's firing was an act intended by the employer to, in some fashion, inhibit an employee from pursuing those rights and remedies.[13]

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[13] Even though Petitioner did enunciate to the jury what he perceived to be the violation, the clear inference of the appellate opinion that the subsequent pursuit of his remedy under the Workers' Compensation Act would seem to mitigate against any potential

(Footnote continued on following page)

Further, motive is not the issue: It is the intent of the employer at the time of the discharge that is the focus of the element of proof. There is a substantial difference between motive and intent that has long been recognized in the law.[14]

Under our dual system of government, federal courts are bound by state substantive law in diversity cases. In a federal diversity case, the court will apply state law, rather than fashioning rules of federal common law where application of state law involves no significant threat to an identifiable federal policy or interest (*Wallis v. Pan-American Petroleum Corp.*, 384 U.S. 63, 86 S.Ct. 1301 (1966)). In diversity cases, state court decisions control as to the requirements of a cause of action (*Transcontinental and Western Air, Inc. v. Koppal*, 345 U.S. 653, 73 S.Ct. 906 (1953)) as well as the availability and applicability of certain defenses (*Steele v. General Mills*, 329 U.S.

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[13] *continued*
harm from firing is contradictory to the purpose of an action for retaliatory discharge. Cf. 716 F.2d 1357, 1358, with *Midgett v. Sackett-Chicago, Inc.*, *supra*, at 151: ". . . there is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees."; and, Ill. Rev. Stat. (1983), Chap. 48, Para. 138.4(h), which states in pertinent part: "It shall be unlawful for any employer, . . . to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him by this Act or to discriminate, attempt to discriminate or threaten to discriminate against an employee in any way because of his exercise of the rights and remedies granted to him by this Act.

It shall be unlawful for any employer, . . . to discharge or threaten to discharge . . . an employee because of the exercise of his rights and remedies granted to him by this Act."

[14] See: Prosser, *Law of Torts*, Fourth Edition, p. 31. Further, the appellate court's reliance on *Bryce v. Johnson & Johnson*, 115 Ill.App.3d 913, 450 N.E.2d 1235 (1st Dist. 1983) has been misplaced due to the fact that in that particular case, there was absolutely no evidence presented of a discharge of the "*Bryce*" Plaintiff.

433, 67 S.Ct. 439 (1947)). A question of whether or not given conduct is tortious is peculiarly one of state law (*Fashion Originators Guide v. Federal Trade Com.*, 312 U.S. 457, 61 S.Ct. 703 (1941)). The underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law (*Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967)).

It is clear that the appellate decision in this particular case enunciates elements of the decisional law which heretofore did not exist in Illinois. It places an additional burden of proof upon the Plaintiff and by reason of its precedential effect, presents a clear danger that, at least to the citizens of the State of Illinois, the tort of retaliatory discharge may no longer be considered a viable one within the federal system. As such, the decision by the appeals court herein clearly violates the *Erie* Doctrine and accordingly, certiorari should issue to rectify this glaring error.

IV.

THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO DETERMINE THE ISSUE OF WHETHER OR NOT A REVIEW OF THE JURY'S VERDICT ON THE QUESTION OF A GRANTING OF A JUDGMENT N.O.V. SHOULD BE GOVERNED BY A SINGLE FEDERAL STANDARD OR MUST BE CONTROLLED BY APPLICATION OF STATE LAW WHERE JURISDICTION IS RESTED ON DIVERSITY OF CITIZENSHIP.

As has been noted previously by this Court:

> Lurking in this case is the question of whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement . . . (*Dick v. New York Life Insurance Co.* (1959) 359 U.S. 437, 444-445, 79 S.Ct. 921, 926).

In the case of *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157 (1964), this Court granted certiorari for the purpose of resolving the conflict among the circuits, but declined to enunciate a clear rule by reason of the fact that the court believed the evidence was sufficient under any standard that might be appropriate—state or federal (337 U.S. 152, at 156).

The conflict alluded to in the *Mercer, supra*, case still remains outstanding.[15]

The Seventh Circuit, upon review of the cases, appears to be one of the few circuits which hold that the standard for reviewing a verdict to determine whether or not a judgment n.o.v. should be granted is a state standard, though even within the Seventh Circuit, there has been a difference of opinion.[16]

The Illinois standard is set forth succinctly in the case of *Pedrick v. Peoria and Eastern Railroad Co.*, 37 Ill.2d 494, 510, 227 N.E.2d 504 (1967). The Seventh Circuit itself has stated that under the *Pedrick*, test, a directed verdict or j.n.o.v. should be granted only when "the evidence only supports one reasonable conclusion in Defendant's favor." *Oberman v. Dun & Bradstreet, Inc.*, 705 F.2d 349, 352 (7th Cir. 1974).

The cases suggesting a federal standard applies by reason that the determination of whether or not enough evidence existed to make an issue go to the jury is ultimately tied to the Seventh Amendment, state that a mo-

---

[15] See: 5A Moore's *Federal Practice*, Para. 50.06, and the cases cited therein; and 9 Wright & Miller, *Federal Practice and Procedure*: Civil § 2524 and cases cited therein.

[16] Cf. *F. W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610 (1983) with *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 724 (1967).

tion for judgment n.o.v. should be denied if there is any substantial evidence supporting the verdict; the credibility of witnesses and weight of the evidence, proper consideration on a motion for new trial, are not the concern of the court on a motion for directed verdict or judgment n.o.v.; that the evidence must be viewed in the light most favorable to the party against whom the motion is made and the nonmovant must be given the benefit of all legitimate inferences that may be drawn in his favor; and the motion must be denied if so viewed that reasonable men might differ as to the conclusions of fact to be drawn.[17]

Certiorari should be granted in this case because it is an important consideration for all cases pending in all federal district courts nationally. A clear pronouncement needs to be made as to whether or not a federal standard applies and if so, what that standard is, when a court is asked to review a verdict in light of a trial court's denial of a motion for judgment n.o.v.

Petitioner submits that under any standard enunciated, whether it be a federal standard or the state standard that govern the Seventh Circuit's opinion in this case, reversal of the Seventh Circuit's opinion would be warranted.

However, should this Court believe that the state standard for review of a jury verdict in the question of granting or denying a motion for judgment n.o.v. is applicable, then this Court must conclude that the Seventh Circuit Court of Appeals violated the *Erie* Doctrine, for patently reweighing evidence and giving inferences to Respondent's evidence and against the Petitioner where they are bound to not re-evaluate a jury's determination of factual issues in that fashion.

---

[17] See: footnote 15, *supra*.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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85-1450
No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM HORTON,

Petitioner,

VS.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APP

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-3012

WILLIAM HORTON,

Plaintiff-Appellee,

v.

MILLER CHEMICAL CO., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 83-1060—**Michael M. Mihm,** *Judge.*

ARGUED SEPTEMBER 23, 1985—DECIDED NOVEMBER 6, 1985

Before POSNER and FLAUM, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* In this diversity action, plaintiff William Horton sued his former employer, defendant Miller Chemical Company, Inc. ("Miller Chemical"), for retaliatory discharge. He claimed that the defendant discharged him for pursuing his rights and remedies under the Illinois Workers' Compensation Act ("the Act"), Ill. Rev. Stat., ch. 48, ¶¶ 138 *et seq.* (1983). The jury returned a verdict in favor of the plaintiff and awarded him $73,824 in compensatory damages and $100,000 in punitive damages.

On appeal the defendant argues that the complaint failed to state a claim for relief under Illinois law and that the

district judge erroneously refused to grant its motions for a directed verdict and for judgment notwithstanding the verdict ("JNOV"). The defendant also argues that the plaintiff failed to prove that he was entitled either to $73,824 in compensatory damages or any punitive damages. Finally, he argues that a new trial is required because the verdict was against the manifest weight of the evidence and because the jury instructions on retaliatory discharge were incorrect as a matter of Illinois law. We hold that the district judge should have granted the defendant's motion for JNOV. We therefore do not reach the other three issues presented in this appeal.

I

A

At trial the district judge submitted to the jury the parties' stipulation of uncontested facts. The parties stipulated that the plaintiff had a truck driver/delivery job with the defendant and that the plaintiff sustained injuries on April 24, 1981 for which he sought medical treatment. They also stipulated that

> [o]n or about April 27, 1981, Plaintiff informed . . . [the defendant] that the Plaintiff's . . . [doctor] recommended that Plaintiff be excused from work and further recommended that the Plaintiff was to do no more lifting in order to avoid aggravation of his condition which was caused by the incidents on April 24, 1981.

In addition, the following evidence was presented. On January 16, 1978 the plaintiff was hired by his brother-in-law, then manager at the defendant's Peoria, Illinois office, to be a truck driver/delivery man for the defendant. Plaintiff's job consisted of delivering 55-pound bags of product to the defendant's customers in the northern half of Illinois and the southern part of Wisconsin. When he was initially hired, the plaintiff informed his brother-in-law that he had had a series of lower back problems starting in 1955 and that this might interfere with his abil-

ity to work because he would have to lift the 55-pound bags. During the first week of February 1978 the plaintiff voluntarily resigned because the work was aggravating his back problems. He returned to work on February 20, 1978, and he was rehired by his brother-in-law. In April 1978 he again quit; he was again rehired by his brother-in-law on August 7, 1978. In neither of the instances did the plaintiff file a worker's compensation claim.

In 1979 the plaintiff began to seek different employment because the job with the defendant increased his back problems. He applied for a job for which he allegedly would have received a higher salary, but he was dissuaded from taking it by Larry Hoffman, the defendant's general manager, who told him he would be better off working for the defendant. In March 1980 the plaintiff strained his back while on the job. He filed a worker's compensation claim without the assistance of an attorney which he settled with the defendant's insurance company for $3,056.84.

On April 24, 1981 the plaintiff injured his back while unloading materials from one of the defendant's trucks. Plaintiff reported the incident to Richard Dunham, the new manager of the defendant's Peoria office and plaintiff's brother-in-law's replacement. Dunham authorized him to see the plaintiff's personal doctor. On April 27, 1981 the plaintiff visited his physician, Dr. Grogg. Dr. Grogg diagnosed the plaintiff as suffering from a disc protrusion at the fifth lumbar vertebra and gave him an "Authorization for Absence" slip in which he recommended that the plaintiff be excused from work for approximately one week and that the plaintiff engage in no lifting. The slip did not indicate whether the plaintiff was only to refrain from lifting for one week or whether he was to forever refrain from lifting.

On that same day the plaintiff presented the authorization slip to Dunham. Dunham called his supervisor, Hoffman, in Omaha and told him that the plaintiff had received doctor's instructions not to do any more lifting. Dunham informed him of the plaintiff's medical history of back problems and absences from work. Hoffman au-

thorized Dunham to discharge the plaintiff because the plaintiff could not return to work and to hire another truck driver. When plaintiff went to the company the next day, Dunham called him into his office and told him, "I've talked to Larry Hoffman in Omaha and—. . . I'm sorry, . . . but we have to terminate you. . . . You're a bad risk. We can't keep you on this employment."[1]

Hoffman testified that the company had no set policy concerning sick leave; the local manager—Dunham—had discretion over granting such leave. He also testified that he never gave any thought to recommending that the plaintiff take vacation time, nor did he advise Dunham to tell plaintiff that his medical bills should be submitted to the company for payment. He further testified that no one at the company made any independent effort to discuss the plaintiff's medical condition with his doctor and no one later contacted the plaintiff to see if his condition had improved. Finally, he testified that a good employee who was injured on the job "very possibly" would not be terminated as long as he could come back and perform the work, but his understanding was that the plaintiff "could do no more lifting."

Dunham also testified that he understood the "Authorization of Absence" slip to indicate that the plaintiff could do no more lifting and that he told Hoffman about this. He agreed with Hoffman that no one at the company conducted an independent investigation of the plaintiff's medical condition, told the plaintiff that he would be entitled to make application for temporary total disability benefits, told the plaintiff to submit his medical bills to the company for payment, told the plaintiff if his condition improved he could come back to work, or told the

[1] It is unclear whether the defendant disputes making the statement. For purposes of this appeal, we assume the statement was made.

plaintiff to take some vacation time.[2] Dunham also testified that the plaintiff had been a very good employee and that an employee who became injured or sick while on the job might be off work indefinitely before losing his job. Dunham further testified, and the plaintiff did not dispute, that he never said anything to the plaintiff about filing a worker's compensation claim. Dunham hired the plaintiff's replacement within two weeks after the plaintiff was discharged. The plaintiff never returned to the company again or contacted any officials there about reemployment.

Plaintiff subsequently retained an attorney and, in July 1981, filed a claim for worker's compensation which was settled by Aetna Casualty and Surety Company on October 9, 1981, for $6,800 plus reimbursement for any additional medical expenses personally paid for by the plaintiff.[3] In a letter written to the plaintiff's attorney, Hoffman explained that the plaintiff had been terminated because he could no longer do any lifting and his job with the company required frequent heavy lifting.

In addition to the foregoing testimony, the deposition of Dr. Dennis J. Garwacki, one of the plaintiff's treating physicians, was read to the jury. At his deposition, Dr. Garwacki testified concerning the plaintiff's general physical condition in July 1981 and October 1983. As to his condition in July 1981, Dr. Garwacki stated the plaintiff "was improving . . . [but] he could not return to the heavy lifting that he described." As to his condition in October 1983, he stated that the plaintiff "was normal."

---

[2] The district judge admitted this testimony over the defendant's objection because he believed that it was relevant to the defendant's motive in discharging the plaintiff.

[3] The settlement contract provided that "[s]ince a serious dispute arises as to the nature and extent of disability, if any, resulting from the aforesaid occurrence, the respondent offers and the petitioner agrees to accept $6,800, that amount representing 6¼% loss of use of each leg, plus 9 weeks of disputed temporary total disability benefits. . . ."

With respect to the plaintiff's ability to perform the work as a truck driver for the defendant, the doctor stated

> At that time [October 1983] he told me that he returned to work . . . [as] a security officer and was not going to do any more heavy lifting and bending and I thought that he could probably return to work to that kind of occupation without any problems. . . . He could certainly have [a] recurrence of his [back] problem . . . [if he returned to his job where he was lifting fifty and hundred pound barrels].

At trial the plaintiff said he did not disagree with the testimony given by Dr. Garwacki at his deposition. The plaintiff further testified that in October 1981 he believed he could return to work with the defendant and that, at the time of trial, he believed that his back was in as "good a condition" as it was when he was originally hired by the defendant. He also stated that he had continued to see his regular physician, Dr. Grogg, until at least January 1982 for lower back adjustments.

B

On February 11, 1983 plaintiff filed the instant action against the defendant alleging that he had been discharged in retaliation for pursuing his rights and remedies under the Act. The defendants removed the action to the United States District Court for the Central Division of Illinois because of diversity of citizenship.

In his complaint, the plaintiff alleged that, in violation of sections 4(h) and 8 of the Act,[4] the defendant dis-

[4] Pertinent parts of the Worker's Compensation Act read:

Section 4(h). It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way be-

(Footnote continued on following page)

charged him "for seeking medical care for injuries arising out of and in the course of his employment and for his medical inability to work." The defendant moved for judgment on the pleadings, on the ground that the complaint failed to state a claim for retaliatory discharge. When that motion was denied, the defendant amended its answer and asserted that the plaintiff failed to state a claim under Illinois law.

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[4] *continued*

cause of his exercise of the rights or remedies granted to him by this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his rights or remedies granted to him by Act.

Section 8. The amount of compensation which shall be paid to the employee for an accidental injury not resulting in death is:

(a) The employer shall provide and pay for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury. The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required.

The employee may at any time elect to secure his own physician, surgeon, and hospital services at the employer's expense:

. . .

(b) If the period of temporary total incapacity for work lasts more than 3 working days, weekly compensation as hereinafter provided shall be paid beginning on the 4th day of such temporary total incapacity and continuing as long as the total temporary incapacity lasts.

At trial, after all of the plaintiff's evidence had been presented, the defendant moved for a directed verdict on the ground that the plaintiff had failed to state a claim for retaliatory discharge or, in the alternative, had failed to set forth any evidence from which it could be found that the plaintiff had been discharged for pursuing his rights and remedies under the Act. The defendant argued that the plaintiff had failed to state a claim because he did not plead that he had been discharged for filing or threatening to file a worker's compensation claim and that there could be no claim of retaliatory discharge if the defendant discharged the employee solely because of his "medical inability to work."

The district judge granted in part and denied in part the defendant's motion. He first observed that the plaintiff had presented three theories for relief: wrongful discharge, refusal to rehire, and failure to rehire in another job for which he was qualified. He granted the directed verdict on the two latter theories, reasoning that the Act imposed no affirmative duty on an employer to rehire an employee and that there was no evidence that the employer refused to rehire him either as a truck driver or in some other suitable capacity. As to the wrongful discharge theory, he recognized that because the plaintiff was an at-will employee, the employer could rightfully discharge him for his "medical inability to work." He ruled, however, that sufficient evidence had been presented from which a jury might infer that the plaintiff had been discharged for seeking medical attention or to deter him from seeking further compensation under the Act. Specifically, he ruled

> I think as I indicated earlier this is a close question on the directed verdict, but there is evidence in this case that what he was told was that he was being terminated because he was a bad risk, not that he was unable to perform the work but that he was a bad risk. "Risk" can be argued in terms of the meaning. I don't know what it means but it is certainly open to argument.

The district judge states that were it not for the testimony regarding "bad risk" he would have directed a verdict in favor of the defendant.

II

A

The defendant argues that the complaint fails to state a cause of action. We need not address this issue, however, because we find that, even assuming the complaint states a cause of action, the judgment must be reversed because the defendant was entitled to a JNOV.

In diversity actions, state law governs the dispositions of motions for directed verdict and JNOV. *F.W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983); *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 352 (7th Cir. 1974). Under Illinois law, the state law governing this case, a directed verdict or JNOV should only be entered when all of the evidence, viewed in its light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *McMahon v. Richard Goragd, Inc.*, 481 N.E.2d 787, 791 (Ill. App. 5th Dist. 1985) citing *Pedrick v. Peoria and Eastern Railroad Co.*, 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967). This circuit has held that under the *Pedrick* test a directed verdict or JNOV should be granted when "the evidence only supports one reasonable conclusion in defendant's favor." *Oberman*, 507 F.2d at 353.

Under this standard, *all* of the evidence must be considered. *Pedrick*, 37 Ill.2d at 502-03, 229 N.E.2d at 509. In addition, a directed verdict or JNOV may be appropriate even when the nonmovant has presented more than a mere scintilla of evidence, *id.*; *McMillen v. Carlinville Area Hospital*, 114 Ill. App. 3d 732, 738, 450 N.E.2d 5, 10 (4th Dist. 1983), although a directed verdict or JNOV is "highly inappropriate . . . [in cases] where there . . . [are] numerous factual questions to be presented to the jury." *Sandburg-Schiller v. Rosello*, 119 Ill. App. 3d 318,

335, 456 N.E.2d 192, 204 (1st Dist. 1983). The non-movant "has the right to prove . . . [his case] by circumstantial evidence, which consists of proof of facts and circumstances from which the jury may infer other connected facts, reasonably following from the proven facts and circumstances." *Id.*, 456 N.E.2d at 204.

In Illinois, to recover for retaliatory discharge, a plaintiff must show that he was discharged "in retaliation for his activities, and that the discharge be in contravention of a clearly mandated public policy." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981). In most cases the plaintiff alleges that he was discharged because he filed, or threatened to file, a worker's compensation claim. *See, e.g., Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). However, recent Illinois cases hold that a plaintiff can also establish a claim for retaliatory discharge if he can show that the employer's motive for discharging him was to interfere with his exercise of *any* of his rights under the Act. *See Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 161, 473 N.E.2d 935, 937 (1984) (plaintiff states a claim for retaliatory discharge when she alleges that her employer discharged her for filing worker's compensation claims against her former employer); *Wolcowicz v. Intercraft Industries Corp.*, 133 Ill. App. 3d 157, 161, 478 N.E.2d 1039, 1042 (1st Dist. 1985) (plaintiff states claim for retaliatory discharge when he alleges that employer discharged him for no cause and that employer attempted to have plaintiff sign a waiver of all claims for work-related injuries); *cf. Burgess v. Chicago Sun-Times*, 132 Ill. App. 3d 181, 185, 476 N.E.2d 1284, 1287 (1st Dist. 1985) (plaintiff fails to state a cause of action for retaliatory discharge when there was not a single allegation in plaintiff's complaint that he intended to seek relief under the Act or that the defendant was informed, or in anyway found out, that the plaintiff was pursing any remedy under the Act and the defendant went ahead and discharged him because of it). Thus a claim for retaliatory discharge is not limited to those cases in which the employer is al-

leged to have discharged the employee because he filed or would have filed a worker's compensation claim.

On the other hand, a plaintiff does not establish a claim for retaliatory discharge if all he can show is that the employer refused to grant him the rights and remedies that he was entitled to under the Act. *See Robertson v. Travelers Ins. Co.*, 95 Ill. 2d 441, 450-51, 448 N.E.2d 866, 870-71 (1983). If, for example, an employee is entitled under the Act to temporary leave or temporary benefits because of a work-related injury, and the employer refuses to grant that leave or benefits, the employee is barred by the exclusivity provision of the Act from maintaining a separate common law action against the employer. *Id.*; *Cook v. Optimum/Ideal Managers Inc.*, 130 Ill. App. 3d 180, 186-87, 473 N.E.2d 334, 338-39 (2d Dist. 1985). There is also no cause of action for retaliatory discharge if an employer merely discharges an employee because of the employee's status, and not for his activities. *See Mein v. Masmite Corp.*, 124 Ill. App. 3d 617, 618, 464 N.E.2d 1137, 1138 (1st Dist. 1984) (no cause of action for "retaliatory discharge" when the employee alleges that he was discharged because of his age, not because of his conduct or activity). *See also Thomas v. Zamberletti*, 134 Ill. App. 3d 387, 390-91, 480 N.E.2d 869, 871 (4th Dist. 1985) (no cause of action for retaliatory discharge when plaintiff merely alleges that he was discharged for failing to report to work and not in retaliation for receiving medical treatment for injuries sustained in an automobile accident).

These Illinois' cases demonstrate that to show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.

B

In this case, there are no disputed facts.[5] Thus, this is not a case that is peculiarly "inappropriate" for resolution by a directed verdict or JNOV. Proceeding with the application of the *Pedrick* test to the facts of this case, it is clear that the plaintiff established that he was discharged. Nonetheless, it is equally clear that the plaintiff has simply failed to set forth sufficient facts from which a jury could reasonably infer, given all of the evidence presented at trial, that the defendant's motive in discharging him was to deter him from exercising, or to interfere with the exercise of, his rights under the Act. Thus, under the standard set forth in *Pedrick*, the defendant was entitled to a JNOV.

The evidence in the record that the defendant's motive for discharging the plaintiff was related to the exercise of his rights under the Act was (1) his own testimony that Dunham discharged him because he was a "bad risk," (2) the fact that he was discharged almost immediately after he had seen his own physician, (3) the fact that the physician's report was ambiguous about whether the plaintiff was to *forever* refrain from lifting, (4) the defendant's failure to consider alternatives to discharging the plaintiff—a concededly good employee, (5) his own testimony that he was not permanently disabled, and (6) the defendant's knowledge that the plaintiff had previously filed a worker's compensation claim.

The district judge held, and we agree, that the plaintiff's testimony about "bad risk" was the only evidence that even hinted that the defendant's motives in discharging the plaintiff were linked to the Act.[6] He also acknowledged and we agree that the phrase "bad risk"

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[5] *See supra* note 1.

[6] We note that the plaintiff did not originally plead that Dunham had told him that he was a "bad risk." The "bad risk" theory developed at trial after the district judge decided that it was the only evidence that supported the plaintiff's claim.

is very ambiguous.[7] The fact that the plaintiff was discharged almost immediately after seeking medical attention was not probative of motive since the defendant had originally authorized him to take time off from work to see his physician.[8] The fact that the defendant knew that the plaintiff had successfully filed a previous claim for relief was also only probative of motive when coupled with the plaintiff's testimony regarding "bad risk." The other evidence only showed that perhaps the plaintiff had been unjustly treated because the defendant had erroneously decided that the plaintiff was permanently disabled. The plaintiff therefore presented some, albeit minimal, evidence that the defendant discharged him because he thought the plaintiff was a "bad risk" for exercising his rights under the Act.

Nonetheless, the probative value of this scant evidence is greatly diminished when viewed in light of the other evidence that was presented or that was completely lacking at trial. At trial, the plaintiff conceded that Dunham authorized him to take time off from work to consult a physician and that he did so. He also stipulated that he had informed the defendant on April 27 that his doctor recommended that he could do "no more lifting." There was no testimony that the plaintiff ever objected to the defendant about the discharge or that he ever asked for an explanation from Dunham about what he meant by

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[7] This testimony is similar to the plaintiff's testimony in *Bryce v. Johnson & Johnson*, 115 Ill. App. 3d 913, 922-23, 450 N.E.2d 1235, 1240 (1983), that he was told by one of his superiors that he did not need a lawyer, but that the defendant would take care of him. As in this case, arguably it could be inferred from the plaintiff's testimony that the defendant meant to discourage the plaintiff from pursuing a claim, but as the court observed in *Bryce*, "[t]aking this testimony at face value, it is not by any means equivalent to even the slightest violation of . . . [the Act] concerning restraint or coercion against the employee in any manner for exercising his rights under the . . . Act." *Id.*

[8] In fact, the plaintiff has never argued that he had been discharged for having sought that medical attention.

"bad risk." The plaintiff did not suggest that any of the defendant's employees ever said anything to him about filing a worker's compensation claim or about his prior claim. In fact, the plaintiff insisted that none of the defendant's employees ever informed him about his rights under the Act. He did not dispute Dunham's testimony that at no time did Dunham and he ever discuss the plaintiff's rights under the Act. Moreover, the plaintiff conceded that he did pursue his rights under the Act without opposition by the defendant and that he received all of the temporary total disability to which he was entitled. Finally, the plaintiff failed to identify at trial the particular right or rights under the Act that the defendant was alleged to have interferred with[9] and, frankly, we simply cannot divine any from the record.

In addition, Hoffman and Dunham testified consistently with one another that they understood the doctor's note to mean that the plaintiff could do no more lifting, that he could therefore not perform his job and that, as a result, he had to be discharged. The plaintiff's personnel sheet indicated that he had had a series of back problems and that he had been terminated because the "[r]ecurrence of [an] old back injury prevents working." Hoffman informed the plaintiff's lawyer that the plaintiff was discharged because he could do "no more lifting." The plaintiff's doctor (who had no apparent interest in the outcome of this law suit) stated that in July 1981 the plaintiff could not return to a job requiring heavy lifting and that in

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[9] Perhaps he intended to argue that because of this provision for temporary compensation, he also had a right to be off work temporarily and that the employer could not discharge him during that period. At trial, when questioned by the district judge about the theory of the case, plaintiff's counsel made vague references to the fact that he was entitled to temporary total disability compensation, *see* section 8(b). Although we can find nothing in the Act that provides that an employee cannot be discharged during the period that he is temporarily disabled, we note that if the plaintiff's theory is correct, plaintiff's exclusive remedy for the discharge would be found under the Act. *See* discussion *supra* at 12.

October 1983 the plaintiff could suffer a recurrence of his back problems if he engaged in heavy lifting. The plaintiff testified that he did not disagree with these statements. He also testified that in October 1981, his back was in "as good a condition" as it was when he was hired—when he voluntarily quit for five months because his back "wouldn't take it." The plaintiff also continued to see his treating physician for "back adjustments" as late as January 1982.

Thus most of the evidence presented at trial, including that presented by the plaintiff, demonstrated that the plaintiff did indeed suffer from a back problem that prohibited him from working as a truck driver/delivery man and that he pursued all of his rights under the Act without opposition or interference by the defendant. In light of all of this evidence,[10] the plaintiff's own testimony with respect to the defendant's ambiguous statement regarding "bad risk," and his other evidence regarding how he may have been discharged unjustly were simply insufficient to support the jury's verdict that the plaintiff was a victim of retaliatory discharge. *See Bryce v. Johnson & Johnson*, 115 Ill. App. 3d 913, 922-24, 450 N.E.2d 1235, 1240-41 (1st Dist. 1983) (judgment in favor of plaintiff on claim for retaliatory discharge reversed even though the plaintiff testified that the defendant told him that "he didn't need a lawyer" when there was no evidence that the plaintiff was discharged, when there "is [a] total absence of even the slightest interference by the defendant in the exercise by plaintiff of all of his rights under the . . . Act," and when the plaintiff exercised his rights with complete

[10] *I.e.*, plaintiff's admission that he told Dunham he could do "no more lifting," his own testimony regarding the condition of his back, his own failure to testify that on April 27, 1981 he objected to his discharge, his own failure to contact the defendants after he was discharged, Dunham's and Hoffman's highly inconsistent testimony, Garwacki's deposition, the documentary evidence, and the fact that Dunham never said to the plaintiff anything that even remotely smacked of retaliation other than "a bad risk."

effectiveness). *See also Pedrick*, 37 Ill.2d at 511, 229 N.E.2d at 514 ("When the dubious probative value of the testimony of the plaintiff's is considered in the light of the unequivocal testimony by persons with no apparent interest in the outcome of his lawsuit and the corroborative testimony of the . . . [defendant's] employees, we believe that it may be fairly said that all of the evidence so overwhelmingly favors the defendant that a directed verdict should have been granted."). *Cf. Darnell*, 105 Ill. 2d at 162, 473 N.E.2d at 937 (Trial judge erroneously granted defendant's motion for directed verdict when the plaintiff testified that one of the defendant's employees told her that she was being discharged because she had filed a claim against her former employer and when the record contains documentary evidence that one of the defendant's employees called the plaintiff's prior employers to verify that she had previously filed claims.); *Wolcowicz*, 133 Ill. App. 3d at 161, 478 N.E.2d at 1042 (plaintiff states a claim for retaliatory discharge where he alleges that he was discharged without any reason being given and where defendant told the plaintiff, who read no English, to sign a document, written in English, waiving all claims against the defendant for work-related injuries).

It is possible that the plaintiff may have been discharged without just cause, but in Illinois an employer is not liable in tort for discharging an at-will employee because it erroneously believes that the employee is permanently disabled. Tort liability only attaches when the plaintiff sets forth sufficient evidence of the defendant's illegal motive. In this case that evidence was not presented.[11]

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[11] There is some hint in recent Illinois' cases that the burden of proof scheme set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should apply in the instant case. *See Darnell*, 105 Ill. 2d at 162-63, 473 N.E.2d at 938 (Simon, J., concurring) (suggesting that directed verdict may be appropriate when the plaintiff presents a prima facie case, the defendant presents a legitimate non-discriminatory reason for the discharge, and the plaintiff fails to rebut the non-discriminatory reason).

(Footnote continued on following page)

The judgment of the district court is reversed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] *continued*

In this case, the defendant presented a legitimate non-discriminatory reason and it would have been entitled to summary judgment, because the plaintiff simply failed to present sufficient evidence that the proffered reason was pretextual.

JUDGMENT–ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 6, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

WILLIAM HORTON,

Plaintiff-Appellee,

No. 84-3012 vs.

MILLER CHEMICAL COMPANY, INC.,
a foreign corporation,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois, Peoria Division.
No. 83 C 1060
Judge Michael M. Mihm

This cause was heard on the record from the United States District Court for the Central District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 27, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

WILLIAM HORTON,

Plaintiff-Appellee,

No. 84-3012 vs.

MILLER CHEMICAL COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 83-1060
Michael M. Mihm, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc*, members of the panel have voted to deny said petition. No active member of the court has called for a vote on the suggestion that the matter be reheard *en banc*.

It is therefore ordered that said petition for rehearing be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
No. 84-3012

WILLIAM HORTON,

Plaintiff-Appellee,

vs.

MILLER CHEMICAL COMPANY, INC.,

Defendant-Appellant.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC*

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
Honorable Michael M. Mihm, Judge.

INTRODUCTION

The decision of the panel in this cause granted Defendant a JNOV and ordered reversal of a verdict for Plaintiff of $75,000 compensatory and $100,000 punitive damages, finding Defendant guilty of the Illinois common law tort of Retaliatory Discharge;[1] the panel's decision was the direct result of the panel having mandated elements of proof *which do not exist* under Illinois common law, in

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* [The Cover, Certificate of Interest, Table of Contents, and Table of Authorities of the Petition have been omitted in printing.]

[1] The jury deliberated less than ninety minutes.

conjunction with a patent *reweighing of factual evidence* and re-assessment of witness credibility—all of which is in direct contradiction to the mandate for reviewing state actions in diversity cases as enunciated by *Erie R. Co. v. Tompkins*, (1938), 585 S.Ct. 817; 304 U.S. 64; 82 L.ed. 1188, its progeny, Title 28, USCA 1652, Article I, Sec. 2, 12, and 13 of the Constitution of the State of Illinois and Amendments V, VII and X to the Constitution of the United States of America.

The specific resolution of the panel's opinion is based entirely upon a categorization of witness credibility vis-a-vis Defendant's claim that it erroneously believed the Plaintiff was medically unable to work. This very question was specifically directed to the jury in the instruction given, over Plaintiff's objection, which mandated that:

> If you find that the Plaintiff was discharged because of physical inability to perform the duties of his employment rather than for having pursued his rights and remedies afforded to him under the Illinois Workers' Compensation Act, then your verdict should be for the Defendant.

At trial, the Defendant argued it believed Plaintiff was permanently disabled. But Plaintiff showed the jury the doctor's excuse which provided that he not work for *only seven days*. Plaintiff was fired immediately.

The decision by the panel has, effectively, deprived the Plaintiff of his right to remedy guaranteed by the Constitution of the State of Illinois, and the federal constitutionally guaranteed right of a jury trial and due process. Because of the inherent conflict with *Erie*, the panel has interfered with the constitutionally guaranteed right of the states to govern themselves where federal powers have not been specifically reserved.

ARGUMENT

I. THE PANEL'S DECISION DIRECTLY VIOLATES THE PRINCIPAL OF *ERIE R. CO. V. TOMPKINS*, AND ALL OF ITS PROGENY, BY FORMULATING ELEMENTS OF PLAINTIFF'S CAUSE OF ACTION WHICH ARE CLEARLY AND EXPLICITLY NOT MANDATED BY THE ILLINOIS SUPREME COURT.

It is undisputed that the federal courts are bound, under our dual system of government, to be governed by state substantive law in diversity cases. It is equally clear that a court in a federal diversity case will apply state law, rather than fashioning rules of federal common law where application of state law involves no significant threat to an identifiable federal policy or interest (See: *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 16 L.Ed.2d 1368, 86 S.Ct. 1301). Further, in a diversity action, the federal court is bound by applicable state law as the court defines it today, not what it may be tomorrow (*Ford Motor Co. v. Mathis*, (CA5 Tex) 322 F.2d 267).

Accordingly, under the "doctrine" of *Erie R. Co. v. Tompkins, supra*, in diversity cases, state court decision controls as to the *requirements of a cause of action* (See: *Transcontinental and Western Air, Inc., v. Coppal*, 345 U.S. 653, 97 L.ed. 1325, 73 S.Ct. 906)[2] *as well as the availability and applicability of certain defenses* (See: *Trust Co. of Chicago v. Penn.R.Co.*, 329 U.S. 433, 91 L.ed. 402, 67 S.Ct. 439) (Emphasis added).

The Supreme Court of the State of Illinois has spoken consistently as to what is required for a Plaintiff to bring a cause of action for retaliatory discharge.

> ". . . [I]n *Palmateer v. International Harvester Co.*, (1981) 85 Ill.2d 124, an employee was terminated for informing police of suspected criminal activities of his

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[2] A question of whether or not given conduct is tortious is peculiarly one of state law. *Fashion Originators Guide v. Federal Trade Com.*, 312 U.S. 457, 85 L.ed. 949, 61 S.Ct. 703.

co-workers. In holding that the tort of retaliatory discharge was applicable, we stated:

> 'The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses. . .'
>
> All that is required (to bring a cause of action) is that the employer discharge the employee in retaliation for the employees activities, and that the discharge be in contravention of a clearly mandated public policy." 85 Ill.2d 124, 133-134. (*Midgett v. Sackett-Chicago, Inc.*, (1984) 105 Ill.2d 143, 148)

There is no Illinois decision holding that ". . . the Plaintiff must set forth sufficient facts from which it can be inferred that 1) he was discharged or threatened with discharge and 2) the employers *motive* in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights.". (Panel Decision, No. 84-3012, Page 11) (Emphasis added)

Retaliatory discharge is a common law tort of the State of Illinois. As such, the intent of the Defendant becomes the focus of the fact finders inquiry. Motive is *not* an element of the cause of action. As Dean Prosser pointed out:

> "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. . .
>
> Intent is the word commonly used to describe the desire to bring about the physical consequences, up to and including the death; the more remote objective which inspires the act is called "motive". The one is merely a step less removed from the muscular contraction than the other, each has its own importance in the law of torts, . . .

> Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also those which the actor believes are substantially certain to follow from what he does . . . A practical application of this principal has meant that where a reasonable man in the Defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it." (Prosser, Law of Torts, 2d Ed., P. 31)

Motive and intent are not one in the same. By mandating that motive become the focal point of inquiry, the panel's decision effectively adds a new element of proof, which has heretofore never been suggested by any of the decisions of the Illinois Supreme Court in this particular area. Furthermore, intent is a difficult proposition because, as the jury was instructed, it may not be proved directly as there is no way of fathoming or scrutinizing the operations of the human mind. We may only infer a person's intent from surrounding circumstances, and by considering statements made or acts done or omitted by a party who's intent is in issue.

The panel's decision attempts thereby to bridge with superimposition, those requirements mandated in proof of federal civil rights claims or federal discriminatory schemes onto the Illinois common law cause of action for the tort of retaliatory discharge. The panel's decision states ". . . [I]n Illinois an employer is not liable to tort for discharging an at will employee because it erroneously believes that the employee is permanently disabled. Tort liability only attaches when the Plaintiff sets forth sufficient evidence of the Defendants illegal motive. . .11" (Footnote "11" goes on to expand upon the burden of proof scheme which, essentially, would mandate that if an employer can show any legitimate reason for the discharge, then the Plaintiff/employee must come forward to rebut the nondiscriminatory reason and establish that it is in some fashion pretextual).

Under any reading of all of the Illinois Supreme Court Opinions addressing what constitutes a retaliatory discharge, it has been stated that all that is required to bring a cause of action is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy (See: *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 148).

A

The burden of proof requirement set forth by the panel is foreign to this peculiarly state common law tort. This enunciation flies in the face of all decisional authority by the state's highest court—as well as any lower court that has addressed the issue.

The statement of Justice Simon referred to in the panel's footnote "11" does *not* imply adoption of the federal discriminatory proof scheme. It states:

> "Our opinion does not suggest, however, much less hold, that the Defendant could not have discharged the Plaintiff for dishonesty if it demonstrated, as it contends was the case, that she had lied on her application. The verdict was directed before the Defendant offered any evidence of its reason for discharging the Plaintiff. *What the reason for the discharge was is a question of fact to be determined by the finder of fact after the Defendant has presented its case* (*Darnell v. Impact Industries* (1984) 105 Ill.2d 158, 163, Justice Simon concurring) (Emphasis added).

The result of the decision herein is that the panel has reweighed the evidence presented, reassessed the credibility of the witnesses in their testimony, all to arrive at a determination that the facts as presented would support the Defendant's claim that the Plaintiff was erroneously assumed permanently unable to work and, accordingly, properly discharged. Such a question is proper for the trier of fact!

B

Assuming, arguendo, that such a requirement of proof exists, mere examination of all of the evidence presented and *the instruction to the jury shows that the jury clearly considered and was required to address the claim by the Defendant that the Plaintiff was discharged because of their (Defendant's) belief he (Plaintiff) was medically unable to work.*

When all of the evidence is fairly viewed in the light most favorable to Plaintiff[3], it must be concluded that Plaintiff met this burden.

The panel *accepts*, as true, Defendant's argument that they truly believed the Plaintiff could never again perform the work—*because of what the doctor's excuse stated.* The panel also categorized the doctor's slip as being "ambiguous" as to whether Plaintiff was forever unable to return to work—yet *ignores* the fact that the authorization for absence, on its face, provided for only a seven day absence. The jury was able to view the doctors "slip" authorizing Plaintiff's absence which is reproduced herein:

AUTHORIZATION FOR ABSENCE

Date 4/27/31

This is to certify that Bill Adams

is under my care. In order to avoid aggravation of his/her condition,

I recommend that he/she be excused from 4/27/31

until 5/4/81.

Remarks: [illegible]

[illegible]
Authorizing doctor

[illegible]

[illegible]

3 *Pedrick v. Peoria & Eastern Railroad Co.*, (1967), 37 Ill.2d 494, 510.

As can be seen, the slip readily states that the Plaintiff should be excused from 4/27/81 until 5/4/81 in order to avoid aggravation of his/her condition. It was dated 4/27/81, the date of delivery to Defendant's agent, Dunham. *This was the only evidence ever available to the Defendant in making its decison.* That is unrefutted in the transcript before this Court. The panel *fails* to mention this very significant fact in its opinion. Furthermore, the jury was specifically instructed as follows:

> "The Plaintiff in this case was an at-will employee and the Defendant had the right to discharge him for any reason other than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act. *If you find that the Plaintiff was discharged because of physical inability to perform the duties of his employment rather than for having pursued the rights and remedies afforded to him under the Illinois Workers' Compensation Act, then your verdict should be for the Defendant* (Transcript of Hearing, Page 241)"[4]

Thus, the panel's decision is based upon *its* acceptance of Defendant's proferred good faith excuse—despite the fact that this excuse was argued to the jury and the jury was required, by instruction, to find it without merit before finding for Plaintiff on the question of liability.

II. THE PANEL'S DECISION IS APPROPRIATE ONLY IF ALL THE EVIDENCE PRESENTED IS REWEIGHED AND CREDIBILITY OF WITNESSES REASSESSED TO REACH INFERENCES CONTRARY TO PLAINTIFF'S CAUSE OF ACTION—A CLEAR VIOLATION OF THE *ERIE* DOCTRINE.

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[4] This instruction was tendered by Defendant over objection of counsel for the Plaintiff, as it did not state the law. The ruling of the panel in this case directly contradicts that very instruction upon which the jury specifically answered, in its verdict for the Plaintiff, with a resounding "no"!

A federal court must, as has previously been noted, in diversity actions follow state law in the disposition of motions for directed verdict and judgment not withstanding the verdict. Under Illinois law, verdicts ought to be directed and judgments NOV entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. (*Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill.2d 494, 510).

In evaluating the evidence, all reasonable inferences must be made in favor of the party opposing the Motion (*Public Taxi Service, Inc. v. Barrett*, (1976) 44 Ill.App.3d 452; *Mollen v. General Motors Corp.* (1975) 32 Ill.App.3d 122). Further, where there exists a substantial factual dispute *or where the assessment of a witness' credibility and the election between conflicting evidence may be decisive, a judgment notwithstanding the verdict is appropriate* (*Reynolds v. American Oil Co.*, (1975) 32 Ill.App.3d 905, 909) (Emphasis added).

The panel decision has reassessed the evidence, reweighed credibility, and elected between conflicting pieces of evidence in the following:

1) "(3) the fact that the physicians report was ambiguous about whether the Plaintiff was to *forever* refrain from lifting, . . ." (emphasis provided) (Panel decision, Page 12). The only physicians report that was presented to the Defendant in this case on April 27, 1981, was the authorization for absence slip which has previously been reproduced herein. That slip merely provided that the Plaintiff needed to be off work until May 4, 1981, to avoid aggravation of his condition. At *no place* does that slip indicate anything more than a need to be off work until May 4, 1981. Further, it was the argument of the Defendant throughout this case before the jury that Defendant believed Plaintiff was medically unable to work; and, as has been previously noted, the jury was instructed that if they believed that Plaintiff was discharged because of

his medical inability to work, then they should find for the Defendant. Thus, the panel's decision categorizes and interprets the evidence that there was an ambiguity about whether the Plaintiff was to forever refrain from lifting.

2) The conclusion drawn, that the Plaintiff was discharged almost immediately after seeking medical attention was not probative of motive since the Defendant had originally authorized Plaintiff to take time off from work to see his physician. It ignores the fact in evidence that the doctor's slip only authorized Plaintiff's absence from work for a *one week* period of time, and the unrefuted statement from Defendant less than 24 hours later that the Plaintiff was discharged because he was a "bad risk".

3) The statement: ". . . the other evidence only showed that perhaps the Plaintiff had been unjustly treated because the Defendant had *erroneously decided* that the Plaintiff was permanently disabled." (Panel decision, Page 13) (Emphasis supplied). This language clearly reflects a categorization and assessment of all of the evidence. It accepts as correct the proposition of the Defendant that it was mere error on their part to assume that the Plaintiff was permanently disabled. That, in and of itself, goes to the question of Defendant's *intent* at the time of discharge when they told the Plaintiff he was a "bad risk". *This was a disputed factual question before the jury,* resolved against the Defendant.

4) The statement: "In addition, Hoffman and Dunham testified *consistently* with one another that they understood the doctors note to mean that the Plaintiff could do no more lifting, that he could not, therefore, perform his job, and that as a result, he had to be discharged." (Emphasis added, Panel decision, P. 14); draws the *conclusion* that the testimony of these two individuals was consistent, that they were credible in stating their testimony and that greater weight should be given to that testimony than the fact that Mr. Dunham was consistently impeached throughout his testimony. *All of Defendant's personnel who testified at trial had to admit that the word*

"permanent" did not appear on the slip, and they never talked with Plaintiff's doctor prior to their decision to terminate him.

5) The statement: "Thus, most of the evidence presented at trial, including that presented by the Plaintiff, demonstrated that the Plaintiff did indeed suffer from a back problem that prohibited him from working as a truck driver/delivery man and that he pursued all of his rights under the Act without opposition or interference by the Defendant." (Panel decision, Page 15). All of the evidence concerning the Plaintiff's back condition showed that Plaintiff had a chronic back condition, even before the date he began working with the Defendant. But that he continued to work, and that the Defendant wanted him to continue to work because he was a good employee. There are a large number of people in the working world, who must work despite minor chronic back conditions even though their back may be aggravated by lifting.

The facts presented to the jury in this particular case were submitted by way of testimony, primarily, of the Plaintiff, Defendant's President, Defendant's local manager and the medical doctor, Garwacki. The authorization slip went to the jury. The only possible individual who could be considered having no apparent interest in the outcome of the lawsuit was the physician, Garwacki, who unequivocally stated that the Plaintiff *may* reinjure his back if he would return to that type of work. He did not say that he was unable to do that type of work!

The panel's assessment that Plaintiff should not be doing the type of work he was at the time of his discharge has little to do with the issues in this case.

The only possible way that the decision of the panel can be supported, is if all of the evidence is reweighed, the credibility of the witnesses rejudged, and the interpretation of the evidence given by the panel is accorded the greater weight as against the interpretation of the evidence argued by the Plaintiff *and accepted by the jury.* As previously noted: The non-movant has the right to

prove his case by circumstantial evidence, which consists of proof of facts and circumstances from which the jury may infer other connected facts, reasonably following from the proven facts and circumstances (See: *Sanderg-Schiller v. Rocello*, 119 Ill.App.3d 318).

The reweighing of the evidence, reassessing the credibility of the witnesses and electing between competing pieces of evidence is in direct contradiction to Illinois law governing determination of whether or not a JNOV should be entered. Thus, such a process is in clear opposition to the *Erie* doctrine. The very conclusion that the panel's decision reaches that: ". . . it is possible that the Plaintiff may have been discharged without just cause . . ." (Panel decision, Page 16), bespeaks a factual issue based upon all of the evidence presented to the jury, to wit: what was the intent of the Defendant at the time Plaintiff was discharged and told he was a bad risk?

A

The decison of the panel is, in part, premised upon the conclusion that Plaintiff was able to pursue his rights and remedies under the Workers' Compensation Act and receive an award. The panel concluded his rights were obtained without opposition. This is not correct. Litigation was required. Therefore, the Plaintiff was not prohibited from pursuing those rights and remedies afforded to him. This "conclusion" effectively deprives Plaintiff of a jury trial on the cause of action for retaliatory discharge, a purely common law tort as defined by the Supreme Court of the State of Illinois.

What this must mean is: Even where an individual is discharged and may show evidence of intent by the Defendant, as long as the Plaintiff would subsequently collect, by litigation, some benefit which is his by right he cannot proceed with a cause of action for retaliatory discharge.

The Plaintiff herein was fired and alleges he was fired because he was pursuing the rights accorded to him under

the Illinois Statutory scheme. The firing is, in and of itself, the infringement, whether or not successful, in prohibiting him from actually pursuing those rights accorded to him under the Illinois Workers' Compensation Act. As has been succinctly and consistently pointed out by the Illinois Supreme Court:

> ". . . We consider, however, that in order to provide a complete remedy, it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective bargaining agreement. In *Kelsay*, an essential factor in providing the action for retaliatory discharge was a recognition of the importance of permitting the allowance of punitive damages against the infending employer. This court stated:
>
> > In the absence of the deterrent effect of punitive damages, there would be little to disuade an employer fron engaging in the practice of discharging employees for filing a workers' compensation claim . . . The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice for retaliatory discharge, which mocks the public policy of this state . . . In the absence of other effective means of deterrence, punitive damages must be permitted . . . (Citation)" (*Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 149).

As was further pointed out in *Darnell v. Impact Industries, Inc.* (1984) 105 Ill.2d 158, 161:

> "The Plaintiff argues that the evil resulting from the discharge of an employee for having filed a workers' compensation claim against a prior employer is as great as if the discharge had been effected by the prior employer. We agree. We perceive no distinction between the situation where an employee's discharge for filing a workers' compensation claim

> against the Defendant employer and one where the employer discharges the employee upon discovery that the employee had filed a claim against another employer. *In either situation, a retaliatory discharge is equally offensive to the public policy of this state as stated in the Workers' Compensation Act.* (Emphasis added)

Furthermore, it has been stated:

> "This court determined that the Workers' Compensation Act showed a strong public policy in favor of the exercise of an employees rights under the statute. This policy would be frustrated if employers would be able to discharge employees for filing claims for injuries with impunity. Public policy requires that the employer be made additionally liable for the wrongful discharge." (*Price v. Carmack Datson, Inc.*, ____ Ill.2d ____ (Oct. 1985, Dkt No 60446)).

It is clear that the focal point of a retaliatory discharge claim is the act of termination of the employee. Whether or not the employee subsequently proceeds with those rights afforded to him under the stated public policy of the State of Illinois is irrelevant to a factual determination of whether or not the individual's firing was an act intended by the employer to, in some fashion, inhibit an employee from pursuing those rights and remedies. The firing on one employee may be viewed as a very useful tool, by an unscrupulous employer, attempting to repress other employees from pursuing their rights and remedies under the Act. This is the evil that the tort of retaliatory discharge was enunciated to remedy.

Article I of the Constitution of the State of Illinois provides, in pertinent part:

> "Sec. 12—Right to Remedy and Justice. Every person shall find a certain remedy in the law for all injuries and wrongs which he receives to his person, privacy, property, or reputation. He shall obtain justice by law, freely, completely and promptly."

The decision by the panel in this case has deprived the Plaintiff of his right to the remedy enunciated by the highest court of the State of Illinois, namely, the relief afforded by the common law tort of retaliatory discharge.

CONCLUSION

Plaintiff has, by the panel's decision, been deprived of his remedy, based upon the substantive case law of Illinois. The conclusion of the panel is reached only by *not applying* the state's "substantive" law, reassessing conflicts in evidence and credibility of the witnesses. The clear mandates of our legal system provide protection to a jury verdict. In this instance, they have not been given the deference which they should be accorded. Whether the cause of action is a "satisfactory" one is not the question. The sole question is whether the facts presented can support the verdict.

Accordingly, Plaintiff, WILLIAM HORTON, prays for a rehearing, with suggestion for rehearing in banc, and re-instatement of the verdict awarded to Plaintiff in the district court below.

Respectfully submitted,

LAW OFFICES OF STRODEL, KINGERY & DURREE, ASSOC.

By: /s/ James R. Carter
Attorney for Appellee

JUDGMENT IN A CIVIL CASE

United States District Court	District
Case Title	Central District of Illinois
William Horton	Docket Number 83-1060
v.	
Miller Chemical Co., Inc.,	Name of Judge Michael M. Mihm

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

pursuant to a jury verdict received in open court this date, that compensatory damages are assessed against Defendant Miller Chemical Co., Inc. and in favor of William Horton in the amount of $73,824.00. FURTHER ORDERED that the punitive damages are assessed against Defendant and in favor of Plaintiff in the amount of $100,000.00.

Clerk
/s/ Robert J. Kauffman

(By) Deputy Clerk
/s/ Holly Loudenburg

Date
June 26, 1984

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM HORTON,

Plaintiff,

No. 83-1060 vs.

MILLER CHEMICAL COMPANY, INC.,
a foreign corporation,

Defendant.

ORDER

Defendant filed post-trial motions for judgment notwithstanding the verdict or to alter and amend judgment. Alternatively, Defendant seeks a new trial. All post-trial motions are DENIED.

ORDER ENTERED: October 22nd, 1984.

/s/ Michael M. Mihm
United States District Judge

Copies sent to:

10-22-84
83-1060

Mr. James R. Carter
Mr. Jack Cassidy

AUTHORIZATION FOR ABSENCE

Date 4/27/31

This is to certify that Bill Adam

is under my care. In order to avoid aggravation of his/her condition, I recommend that he/she be excused from 4/27/31

until 5/4/81.

Remarks: [illegible]

Authorizing doctor

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Form D. 208

(3)

No. 85-1450

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

WILLIAM HORTON,

Petitioner,

vs.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RULE

Rule 50, Federal Rules of Civil Procedure 3, 4

TEXT

Stern & Gressman, SUPREME COURT PRACTICE (4th Edition 1969), Sec. 4.14, p. 172 4

No. 85-1450

In The

Supreme Court of the United States

October Term, 1985

WILLIAM HORTON,

Petitioner,

vs.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a diversity action for retaliatory discharge under Illinois law. Specifically, petitioner (plaintiff) claimed that respondent (defendant) terminated his employment "for seeking medical care . . . and for his medical inability to work" in violation of the Illinois Workers'

Compensation Act. [Complaint, par. 11]. The case was tried before a jury and the district court in denying defendant's motion for a directed verdict stated:

> I think as I indicated earlier this is a close question on the directed verdict but there is evidence in this case that what he was told was that he was being terminated because he was a bad risk, not that he was unable to perform the work but that he was a bad risk. 'Risk' can be argued in terms of meaning. *I don't know what it means* but it is certainly open to argument. [TR. 155 (emphasis added)].

Thereafter the jury found for plaintiff and awarded compensatory damages in the amount of $74,824 and punitive damages in the amount of $100,000. The district court denied defendant's post trial motions and it appealed. After thoroughly reviewing Illinois law applicable to directed verdicts, judgments notwithstanding the verdict and the Illinois tort of retaliatory discharge, the court of appeals reversed. The 7th Circuit Opinion [Appendix to Petition A1-A17] observed that "in this case, there are no disputed facts" and that it is appropriate "for resolution by directed verdict or JNOV."/[1] [Pet. App. A12]. Its opinion exhaustively reviews the undisputed facts and states "The district judge held, and we agree, that plaintiff's testimony about 'bad risk' was the only evidence that even hinted that defendant's motives in discharging the plaintiff were linked to the (Illinois Workers' Compensation) Act" [Pet. App. A12] and concludes:

> Thus most of the evidence presented at trial including that presented by the plaintiff, demonstrated that the plaintiff did indeed suffer from a back problem that

---

[1] Judgment notwithstanding the verdict.

prohibited him from working as a truck driver/delivery man and that he pursued all of his rights under the Act without opposition or interference by the defendant. In light of all this evidence,[10]/[2] the plaintiff's own testimony with respect to the defendant's ambiguous statement regarding 'bad risk', and his other evidence regarding how he may have been discharged unjustly were simply insufficient to support the jury's verdict that the plaintiff was a victim of retaliatory discharge. [Pet. App. A15].

—o—

STATEMENT OF FACT

Judge Swygert's opinion for the 7th Circuit accurately states the relevant fact.

—o—

REASONS FOR DENYING THE WRIT

In summary, petitioner's contention is that the directed verdicts and/or judgments notwithstanding the verdict contemplated by Rule 50 of the Federal Rules of Civil Procedure somehow offends the Seventh Amendment to the Constitution of the United States. Any such notion of constitutional trespass was long ago laid to rest in

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2 [10] refers to footnote [10] in 7th Circuit opinion which states: "I.e., plaintiff's admission that he told Dunham he could do 'no more lifting,' his own testimony regarding the condition of his back, his own failure to testify that on April 27, 1981 he objected to his discharge, his own failure to contact the defendants after he was discharged, Dunham's and Hoffman's highly inconsistent testimony, Garwacki's deposition, the documentary evidence, and the fact that Dunham never said to the plaintiff anything that even remotely smacked of retaliation other than a 'bad risk.' "

Galloway v. United States, 319 U.S. 372 (1943). There the Court declared: "If the intention is to claim generally that the (7th) Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.[3] More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure, Cf. Rule 50, Berry v. United States, 312 U.S. 458."

In support of his contentions, petitioner relies heavily upon and adopts by reference the Petition for Writ of Certiorari in *Craft v. Metromedia, Inc.* (United States Supreme Court No. 85-1053)[4] but the Petition in that case was denied on March 3, 1986.

As stated in Stern & Gressman, SUPREME COURT PRACTICE (4th Edition 1969) Sec. 4.14, page 172:

> The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved . . . 'We do not grant a certiorari to review evidence and discuss specific facts.' *United States v. Johnston*, 268 U.S. 220, 227.

Moreover, under Illinois law concerning the tort of retaliatory discharge, the decision of the court of appeals

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[3] Citing: Parks v. Ross, 11 How. (U.S.) 362; Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall (U.S.) 442; Pleasants v. Fant, 22 Wall (U.S.) 116; Marion County v. Clark, 94 U.S. 278; Ewing v. Goode, 78 F. 442 (CC).

[4] For the most part the questions presented and reasons for granting the writ here are almost identical to those as stated in the *Craft v. Metromedia, Inc.* (No. 85-1053) Petition.

was not only permissible—it was required. *Slover v. Brown,* 140 Ill.App.3d 618, 488 N.E.2d 1103 (1986) is an Illinois retaliatory discharge case which finds in favor of the defendant-employer. There, the court framed the question thusly, "How far must an employer go to furnish a job to an employee who has collected under Workers' Compensation Act of Illinois in order to avoid being sued for retaliatory discharge" and declared:

> It has been held that the elements of retaliatory discharge are as follows: (1) plaintiff's status as an employee of defendant before injury; (2) plaintiff's exercise of a right granted by the Act; (3) employee's discharge causally related to the filing of a claim under the Act. Causality does not exist if the basis for discharge is valid and nonpretextual. (*Hansome v. Northwestern Cooperage Co.* (Mo. 1984), 679 S.W.2d 273 (*en banc*).) Thus, an employer may fire an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury. (*Clifford v. Cactus Drilling Corp.* (1984), 419 Mich. 356, 353 N.W.2d 469.)

In this case the following facts are neither contradicted nor discredited and must be taken as true:

1. "(T)hat the plaintiff did indeed suffer from a back problem that prohibited him from working as a truck/driver delivery man" as of April 28, 1981. [Pet. App. A15].

2. That plaintiff pursued all of his rights under the Illinois Workers' Compensation Act "without opposition or interference by the defendant". [Pet. App. A15].

3. That plaintiff's employment was terminated on April 28, 1981 because the "opinion of his doctor ren-

dered him unable'' to perform his work. [Ptf's Ex. 4, Complaint, Par. 11].

4. That plaintiff never requested reemployment nor otherwise contacted defendant after April 28, 1981. [Ptf's Testimony TR. 88-89].

Accordingly, it is clear that the 7th Circuit's decision was palpably mandated under Illinois law.

CONCLUSION

For these and other reasons implicit therein, the petition for certiorari should be denied.

Respectfully submitted,

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